

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-200

FOREST GLADE MANAGEMENT, LLC
APPELLANT

V.

CITY OF HOT SPRINGS, ARKANSAS
APPELLEE

Opinion Delivered November 12, 2008

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. CV2006-124-1]

HONORABLE JOHN HOMER
WRIGHT, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

This appeal involves a claim of inverse condemnation by operation of the City of Hot Springs' mobile-home ordinance. Appellant Forest Glade Management, LLC, brings this appeal from the order of the Garland County Circuit Court that found the ordinance to be a constitutional exercise of the City's police power. The circuit court also found that no taking had occurred. We affirm.

The facts are undisputed. Forest Glade is the owner of a mobile-home park located in Hot Springs. The City has adopted an ordinance that addresses the placement of manufactured and mobile homes within the corporate limits of the City. As relevant to this appeal, section 16-3-3(e) of the Hot Springs Code provides that all manufactured homes placed within the City after the effective date of the ordinance shall have been manufactured

after October 25, 1994, the effective date of federal standards for manufactured homes.¹ Section 16-3-7 allows for older mobile homes to remain if they were in place prior to the effective date of the ordinance.

A dispute arose between Forest Glade and the City over whether Forest Glade was complying with the ordinance. Forest Glade requested a variance, which was denied by the City's planning commission. Forest Glade appealed the denial of its request for a variance to the City's board of directors. The appeal was heard and denied by the board of directors on January 9, 2006.

On February 8, 2006, Forest Glade filed a "Complaint for Declaratory Relief, Inverse Condemnation, and Appeal of Zoning Ordinance." The complaint asserted that section 16-3-3(e) exceeded the City's authority under the statutes permitting a city to enact zoning ordinances; that enforcement of the ordinance amounted to an inverse condemnation of Forest Glade's property; and that Forest Glade was entitled to damages of \$20,000 for the taking of its property. The complaint also sought judicial review of the decision denying the requested variance. The City answered and denied the material allegations of the complaint.

A hearing was held where Nancy Horner, the managing member of Forest Glade, testified that the ordinance impacted her business because she was precluded from renting to persons owning older mobile homes due to their not meeting the 1994 federal standards. She also said that her park was not capable of accommodating double-wide homes without

¹As originally enacted, the ordinance banned mobile homes more than ten years old. The ordinance was amended to its current version in 2005.

extensive renovations and that, under the ordinance, would require the tenants to meet the 1994 federal standards. She estimated that, since its enactment, the ordinance has resulted in a loss of \$37,000 to her business.

After receiving briefs on the constitutional issues, the circuit court issued a letter opinion finding that the ordinance was valid and that Forest Glade's complaint should be dismissed. In its written order, the court found that the ordinance was a valid exercise of the City's police powers, that the ordinance did not violate equal protection, and that the ordinance did not constitute an inverse condemnation "taking" because it did not deprive Forest Glade of "all economically beneficial use" of its property. This appeal followed.

Although Forest Glade lists four points for reversal, there are essentially just two points: (1) that the ordinance exceeds the authority granted by the enabling statute, and (2) that the ordinance results in a regulatory taking requiring compensation under both the federal and state constitutions.²

Forest Glade's first point is that the ordinance exceeds the authority granted to the City to enact a zoning ordinance. An ordinance is presumed constitutional, and the burden of proving otherwise is upon the challenging party. *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998).

Forest Glade's argument is that the ordinance exceeds the authority granted to cities by Ark. Code Ann. § 14-56-416(a) (Repl. 1998) because the enabling legislation does not

²Forest Glade does not address the circuit court's denial of its appeal of the board of directors' decision on its request for a variance. This results in a waiver of the issue. *Uttley v. Bobo*, 97 Ark. App. 15, 242 S.W.3d 638 (2006).

list age as a permissible characteristic for regulation.³ In response, the City argues that section 14-56-416(a)(3)(C) allows the City to consider other factors than those listed in section (a)(3)(A) so that the ordinance is not beyond the City's power. The City also relies on section 14-56-401 concerning the construction of the subchapter. That section provides:

This subchapter shall be construed liberally. The enumeration of any object, purpose, power, manner, method, or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods, or things.

Sections 14-56-401 and 14-56-416 are in pari materia and should be read in a harmonious manner, if possible. *Weiss v. Maples*, 369 Ark. 282, 253 S.W.3d 907 (2007). Moreover, section 14-56-201(1) provides that municipal corporations have the power to regulate the construction of buildings. The ordinance, as amended, is a valid exercise of the City's police

³Section 14-56-416(a) provides that:

(a)(1) Following adoption and filing of the land use plan, the commission may prepare for submission to the legislative body a recommended zoning ordinance for the entire area of the municipality.

(2) The ordinance shall consist of both a map and a text.

(3)(A) The ordinance may regulate the location, height, bulk, number of stories, and size of buildings; open space; lot coverage; density and distribution of population; and the uses of land, buildings, and structures.

(B) The ordinance may require off-street parking and loading.

(C) The ordinance may provide for districts, of compatible uses, for large scale unified development, for elimination of uses not in conformance with provisions of the ordinance, and for such other matters as are necessary to the health, safety, and general welfare of the municipality.

(D) The ordinance shall include provisions for administration and enforcement.

(E)(i) The ordinance shall designate districts or zones of such shape, size, or characteristics as deemed advisable.

(ii) The regulations imposed within each district or zone shall be uniform throughout the district or zone.

powers in that the zoning ordinance references the 1994 federal regulations concerning standards for mobile home construction. As such, the ordinance bears a rational relationship to the health, safety, and welfare of the citizenry because it is establishing certain minimum standards for mobile homes to be placed within the City.

We next address Forest Glade's argument that the ordinance amounted to a taking of its property, entitling it to compensation under both the state and federal constitutions. The United States Supreme Court has recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a taking of the property and thus compensable under the Fifth Amendment. The Court has recognized two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of his or her property, however minor, it must provide just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A second categorical rule applies to regulations that completely deprive an owner of "all economically beneficial use" of his or her property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Outside these two relatively narrow categories, regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Penn Central* set forth several factors to be considered in determining whether a taking has occurred, including the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action.

The mere fact that a partial use of one's property is burdened by regulation does not amount to a taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Andrus v. Allard*, 444 U.S. 51 (1979). Moreover, the mere diminution in value, even where significant, is insufficient to establish a taking. *Concrete Pipe and Prods. of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *Lucas, supra*. Indeed, the Arkansas Supreme Court has noted in several cases that economic impacts greater than that involved here do not amount to "takings" requiring compensation. See *Barrett v. Poinsett County*, 306 Ark. 270, 811 S.W.2d 324 (1991); *Winters v. State*, 301 Ark. 127, 782 S.W.2d 566 (1990); *J.W. Black Lumber Co. v. Arkansas Dep't of Pollution Control & Ecology*, 290 Ark. 170, 717 S.W.2d 807 (1986).

There is no set formula for determining whether a "taking" has occurred. *Lucas, supra*. Although we are unsure of whether the circuit court considered the *Penn Central* factors, we do not believe that a "taking" has occurred. Nancy Horner testified that Forest Glade's income had been reduced by approximately \$37,000. However, there was no proof as to the value of the property, either before the passage of the ordinance or afterwards, or of Forest Glade's net worth. *Black Lumber Co., supra*. Just because Forest Glade lost *income* from the property does not mean that the *value* of the property has necessarily been reduced as a result of the ordinance. Likewise, there is no proof of what it would cost Forest Glade to renovate its park so as to be able to accommodate the larger homes that, according to Forest Glade, currently dominate the market. The City adopted the ordinance so that it could protect the public by regulating the safety of mobile homes. Forest Glade can still rent its lots to owners

of mobile homes that comply with the 1994 federal standards. It has not been deprived of *all* uses of its property.

Affirmed.

HART and GRIFFEN, JJ., agree.